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No. 10-735

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., ET AL.,
Petitioners,

v.

DEANIA M. JACKSON,
ON BEHALF OF HERSELF AND
ALL OTHER PERSONS SIMILARLY SITUATED,
Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

The petition demonstrated that the question presented—whether state courts may employ the class-action device to eliminate fundamental substantive and procedural protections applicable to adjudications of class members' individual claims—is nationally important, recurring, and the subject of conflicts in the lower courts. Plaintiffs' opposition is largely an exercise in distraction and misdirection. Attempting to create an alternative basis for the judgment, plaintiffs invoke causes of action that they never presented to, or were *rejected* by, the jury. Most egregiously, they now say they prevailed on a cause of action distinct from their failed product defect claim (and purportedly based on La. Civ. Code art. 2315) for "nicotine manipulation and addiction." But there is no such freestanding claim in the jury instructions, verdict form, decisions below, or plaintiffs' prior submissions to this Court. Plaintiffs grossly mischaracterize our petition, devoting pages to attacking arguments we never advanced—including that the Due Process Clause forbids States from *prospectively* eliminating reliance for individual and class claims alike. And they conjure up purported "misstatements" that demonstrate only their own infidelity to the record.

The reason for plaintiffs' diversionary strategy becomes obvious on page 30, when they finally turn to the Louisiana Court of Appeal's holding: They have no answer to what that court actually said, other than a transparent attempt to rewrite both the opinion and Louisiana fraud law. Nor do they dispute that due process requires that named plaintiffs fully represent absent class members; they just assert—wrongly—that such representation need

not encompass *weaknesses* in those plaintiffs' claims. Finally, plaintiffs do not deny that this case affords a rare opportunity to review a class action tried to final judgment in the state courts. Certiorari is plainly warranted and urgently needed.

A. The Courts Below Eliminated Individualized Reliance To Facilitate Classwide Adjudication

After many detours, plaintiffs argue (Opp. 29-35) that Louisiana law does *not* require proof of individualized reliance and causation as elements of a fraud claim, even for those suing individually. The decision below, they say, was merely "imprecise" in stating otherwise. Opp. 30. There was nothing "imprecise" about the decision below: It dispensed with the need to show individualized reliance because—and only because—this was a class action.

1. The Court of Appeal expressly recognized that Louisiana fraud law "requires causation in the form of reliance." Pet. App. ("App.") 46a. It then relieved plaintiffs of that burden, however, because this was a class action. Plaintiffs could avoid proving reliance by any real person, the court held, and instead prove only an imaginary construct it called "reliance by the class as a whole." *Ibid.*

The trial court likewise ruled that "individual reliance is not an issue" because plaintiffs had sued on behalf of "the class as a whole" for "a single, common" court-supervised fund. App. 222a. It specifically instructed the jury that "*in this case*" plaintiffs "do *not* have to establish *individual reliance on specific concealments or misrepresentations* allegedly made by these defendants," even though "Louisiana law" requires proof that the fraud "caus[ed] justifiable reliance with resultant injury." 2003-7-24

Tr. 23506 (emphasis added). Instead, the court declared, "reliance" by the class as a whole on a "distorted body" of "public knowledge" sufficed. *Id.* at 23507.

Confirming their departure from settled Louisiana fraud law in order to facilitate classwide adjudication, both lower courts observed that individual reliance would be an essential element of liability if class members were asserting fraud claims individually for other compensatory relief. App. 46a, 222a. It is difficult to imagine a clearer and more flagrant declaration that the class-action vehicle permits the abandonment of established liability elements and defenses that would apply to any individual plaintiff's claims.

2. According to plaintiffs, the Court of Appeal held that Louisiana law eliminates the traditional element of reliance in fraud cases whenever (1) the "fraud occurred by concealment, suppression, or omission," or (2) compensatory relief would take the form of a fund "administered by the court." Opp. 29-30. But as demonstrated by the jury instructions quoted above (which refer to *both* "concealments" *and* "misrepresentations"), Louisiana law does not limit the reliance requirement to cases involving affirmative misrepresentations. (In any event, much of plaintiffs' case at trial turned on alleged affirmative misrepresentations.) And the remedy sought does not *ipso facto* excuse a fraud plaintiff from proving certain elements of her claim. Notably, plaintiffs do not cite a single case suggesting that either distinction could justify eliminating an element of a claim.[1]

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[1] Plaintiffs seek to generate confusion by suggesting that due process does not prevent a State from imposing an objective

3. Plaintiffs mistakenly claim that *Mire* v. *EatelCorp., Inc.*, 849 So. 2d 608 (La. Ct. App. 2003), and *Banks* v. *New York Life Ins. Co.*, 737 So. 2d 1275 (La. 1999), permit reliance to be established on a classwide basis. Opp. 32-33. *Mire* held that reliance is *not an element* of a claim for "redhibition," which requires proof that a product was unfit for its intended purpose. 849 So. 2d at 614. No redhibition claim was tried here, and *Mire* says nothing about Louisiana fraud law. Nor does the Court of Appeal's brief discussion of *Banks* (App. 46a) support the non-existent rule of Louisiana fraud law proposed by plaintiffs. The distinction of *Banks* came immediately after the court's clear statement that the reliance necessary in an individual case could be dispensed with in this class action. The court simply underscored that *Banks*—a case *defendants* relied on—was not an obstacle to its novel conclusion.

B. Plaintiffs Misunderstand The Representational Function Of A Proper Class Action

Plaintiffs argue that whether the decisions below stripped this class action of its essential representative character is not an "issue of great national importance," implicates no conflict, and is not "presented by the proceedings in this case." Opp. 20. That argument rests on a misconception of the basic representational requirement of a class action.

According to plaintiffs, a class action is sufficiently representative if the named plaintiff is an

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"reasonable-person reliance standard" or allowing proof of reliance through expert testimony. Opp. 30-34 (citing only non-Louisiana cases). Those issues are irrelevant, however, because the Court of Appeal unconstitutionally excused plaintiffs from proving individualized reliance of any variety or by any means.

unconflicted "member of the class at the time the class is certified" and subsequently pursues the absent plaintiffs' interests "vigorous[ly]." Opp. 20, 22. Plaintiffs' formula for representativeness omits half of the equation. A class action requires not only an adequate representative, but also a representative trial of some class member's claim. This requirement guarantees the *defendants'* right to *contest* liability through the class representatives. See Pet. 18. Only when class representatives are a vehicle for fully exploring their own and the absent class members' claims—warts and all—can a trial of the representatives' claims suffice to adjudicate everyone's claims, and only if the trial is conducted in a way that preserves that representative function. That is what it means for a defendant to be able "to present every available defense." *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (internal quotation marks omitted). If, as here, weaknesses in the named plaintiffs' individual claims are simply assumed away at trial, then even a "typical" plaintiff cannot fulfill her full representative function.

Plaintiffs' misconception of representational litigation also leads them to misunderstand decisions like *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998), that establish a clear split among the lower courts. That case did not address only "conflicts of interest within the class and statute of limitations defenses." Opp. 22. It also held that "the reliance element of plaintiffs' fraud" claims was "not readily susceptible to class-wide proof" because those claims "turn[ed] on whether each [plaintiff] reasonably relied on [the defendant's]

representations." 155 F.3d at 341. Plaintiffs say nothing about that holding.[2]

Plaintiffs do not dispute that *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), rejected use of the "class as a whole" device to eliminate reliance, but say that *McLaughlin* "is 'no longer good law.'" Opp. 29 (quoting *Spencer* v. *Hartford Fin. Servs. Group, Inc.*, 256 F.R.D. 284, 297 (D. Conn. 2009)). Plaintiffs are wrong. The Second Circuit recently reaffirmed *McLaughlin*'s holding. *UFCW Local 1776* v. *Eli Lilly & Co.*, 620 F.3d 121, 132-36 (2010).[3]

C. The Denial Of Cross-Examination Underscores The Radical Deviation From The Model Of Representative Litigation

Plaintiffs cannot dispute that defendants were denied a full and fair opportunity to cross-examine the class representatives, so they are reduced to dismissing that error as "harmless." Opp. 23. That remarkable view rests on their mistaken assumption that the class-action device justified dispensing with ordinary requirements of Louisiana law. Because

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[2] Plaintiffs ultimately acknowledge "the conflict between *Broussard* and other federal circuits" but contend that the conflict does not implicate States' "implementation of their own class-action requirements." Opp. 22. As previously explained (Pet. 18-19) and not disputed by plaintiffs, however, Federal Rule 23 requirements are grounded in due process.

[3] Plaintiffs ignore *Avery* v. *State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), and *Bell* v. *Farmers Ins. Exchange*, 9 Cal. Rptr. 3d 544 (Cal. Ct. App. 2004). See Pet 20-21. Likewise, plaintiffs do not dispute that the procedures approved below are similar to devices approved by other state courts. See Pet. 29-31; U.S. Chamber Br. 14-16. This Court's review would thus provide widely needed guidance.

those requirements were eliminated, defendants were held liable for misleading class members without a single plaintiff ever testifying and facing cross-examination as to whether he or she was actually misled—an especially egregious omission where the named plaintiffs' pretrial admissions *disproved* that they had been misled. It is impossible to comprehend how the denial of cross-examination here could be labeled "harmless."

Plaintiffs' contention that the class representatives' testimony was "[p]erhaps" cumulative (Opp. 24) is also baseless. Class representatives are not merely alternative sources of evidence. They are direct proxies for the absent class members' claims, and the only means by which defendants may exercise their fundamental right to cross-examination. There is no conceivable substitute for the class representatives' concessions that they did not recall being exposed to or influenced by the defendants' alleged misrepresentations, that they had been warned about and understood the health risks of smoking decades earlier, and that they had themselves quit smoking years earlier.[4]

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[4] Plaintiffs' suggestion (Opp. 19) that the class representatives' decision to quit smoking before trial did not require *decertification* misses the point. The problem is that no representative plaintiff was ever cross-examined on this and other highly relevant subjects. That denial precluded defendants from (among other things) making clear that—even as the plaintiffs claimed to need a smoking cessation program—the class representatives had already quit.

D. None Of Plaintiffs' Distortions Or Distractions Diminishes This Case As A Vehicle

1. Unable to mount a serious defense of the decision below, plaintiffs offer three flimsy reasons why the petition supposedly requests an "advisory opinion." Opp. 11-16.

First, plaintiffs say that the "cause of action based on nicotine manipulation does not require reliance." Opp. 11. But there *is no independent cause of action* for "nicotine manipulation" under Louisiana law, and none is mentioned in the jury instructions or verdict form. 2003-7-24 Tr. 23493-94, 23505-19; App. 234a-51a. The general questions at the beginning of the verdict form that refer to nicotine and addiction were germane to the *product defect claim*, which the jury *rejected*. App. 226a-30a. Plaintiffs misleadingly cite La. Civ. Code art. 2315 to suggest that it supplied a cause of action for nicotine manipulation. Opp. 11-12. But Article 2315 is Louisiana's general statute underlying *every* tort claim; it does not define a specific cause of action. See, *e.g.*, *Veazey* v. *Elmwood Plantation Assocs.*, 650 So. 2d 712, 717 (La. 1994) (Article 2315 is "the fountainhead of tort responsibility in Louisiana") (internal quotation marks omitted). There was thus no mention of any independent "nicotine manipulation and addiction" claim in plaintiffs' complaint; in the Louisiana Court of Appeal's opinions; in plaintiffs' recent stay opposition; or in plaintiffs' prior brief in opposition in this Court. See R.1:1-2, 19-28; App. 263a n.1; Pet. 11 n.3; 07-1272 Opp. 2-3 & n.2.

Second, plaintiffs contend that under Louisiana law a "medical monitoring" claim can be brought as a class action without "proof of reliance." Opp. 15. But

the jury here *rejected* the medical monitoring claim. App. 34a, 255a-57a. In any event, medical monitoring under Louisiana law is merely an element of *damages* "when the plaintiff establishes liability under traditional tort theories of recovery." *Bourgeois* v. *A.P. Green Industries, Inc.*, 716 So. 2d 355, 362 (La. 1998).

Third, plaintiffs assert that, on their assumed-duty claim, reliance is "merely an alternate condition precedent to liability." Opp. 14-15. But the Court of Appeal *rejected* this argument. Defendants argued below that "there was no proof or jury finding that established the necessary causation and other elements of an 'assumed duty' claim." App. 46a. Rather than suggesting that proof of reliance and causation was unnecessary for the assumed-duty claim, the Court of Appeal held that "causation and reliance were adequately proven," App. 48a, because "the only question of reliance pertains to the reliance by the class as a whole," App. 46a. The Court of Appeal correctly recognized that plaintiffs' assumed-duty claim was functionally equivalent to the fraud claim. Compare App. 244a-46a with *id.* at 234a-38a.[5]

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[5] Tellingly, in their stay opposition plaintiffs never suggested that reliance was unnecessary as to *any* of their claims; they argued only (but erroneously) that reliance had been sufficiently proven. Stay Opp. 5-6. In addition, insofar as plaintiffs' assumed-duty theory rested on a supposed duty to refrain from marketing to minors, that claim could not possibly support the verdict. Even according to plaintiffs' experts, the class encompassed many individuals who did *not* start smoking as minors. See Pet. ii; 2003-3-13 Tr. 15965-66 (Arnett: 47% started smoking as adults); 2003-2-12 Tr. 13750 (Cummings: 20%). And proof of a causal nexus for such a claim—*i.e.*, reliance by minors on advertising—was still necessary.

Even if these flawed rationales had merit, plaintiffs do not (and cannot) suggest that the Court of Appeal actually relied on any of them. Accordingly, plaintiffs do not (and cannot) claim that any would qualify as an adequate and independent state-law ground for the judgment below. Plaintiffs' speculation that they might later prevail on these flawed rationales following remand hardly renders "advisory" a decision by this Court invalidating the *actual* basis of the Court of Appeal's decision. Cf. *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 630-31 (1973) (mere "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground").

2. Plaintiffs spill much ink addressing arguments the petition did not make and responding to imaginary "misstatements."

They contend, for example, that the Due Process Clause does not prevent States from omitting the element of reliance from their fraud law. Opp. 25-29. But the petition did not address a State's authority to define its own tort law *prospectively* for individual and class actions alike. The question is instead whether, to make a case "work" as a class action, state courts may *selectively excuse* class action plaintiffs from proving the element of reliance (and overcoming affirmative defenses) that those same plaintiffs would be required to prove (and overcome) in their individual cases.

Plaintiffs also suggest (Opp. 16-19) that defendants' "ire" is improperly trained on "the limited reach of [CAFA]," the "potential [for] 'bet-the-company' liability" in class actions, or the inapplicability of Rule 23 and the Rules Enabling Act to state

courts. But the absence of effective checks on state-court abuses of the class action device is precisely why the due process issue presented here is so important. See Pet 28-33; U.S. Chamber Br. 4-5, 14-20; DRI Br. 3, 11-12.[6]

Plaintiffs also fault us for omitting mention of their conspiracy claim. Opp. 7. Under long-settled Louisiana law, however, conspiracy is *not* an independent "cause of action" (Opp. 7), but rather is dependent upon—and derivative of—proof of an underlying claim. See *Cogswell* v. *Bd. of Levee Comm'rs of Orleans Levee Dist.*, 35 So. 2d 743, 744 (La. 1948). That dependent status was reflected in both the jury instructions and the verdict form. 2003-7-24 Tr. 23510 ("actionable element" in conspiracy claim "is not the conspiracy itself" but the underlying tort); App. 240a-41a (Questions 31-32).

Finally, among many other misstatements, plaintiffs suggest that the petition somehow leaves a "false impression" that "money has been paid" to the class. Opp. 7. We are at a loss to understand how the petition, coming directly on the heels of a stay application granted by Justice Scalia, could possibly leave such a "false impression."[7]

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[6] Plaintiffs suggest that the rulings at issue do not violate due process because this litigation has lasted for 14 years and included numerous appeals (taken by both sides) involving other issues. Opp. 17-18 & n.8. The argument is self-refuting. The *Due* Process Clause requires more than process.

[7] This Court should reject plaintiffs' implicit suggestion to deny review because there is an urgent need to fund the cessation program. Even if need for a remedy could justify overlooking a constitutional error (and, of course, it cannot), free cessation services have been available to Louisiana's citizens for years. See Stay Reply 14.

* * * *

At bottom, this case turns on whether the class-action device is a tool for *aggregation* or *transformation* of class members' individual claims. Unabashedly adopting the latter position, the Louisiana courts departed from long-settled principles of due process and from decisions by numerous other courts. The question presented here is nationally important, rarely before this Court on a fully developed record, and urgently in need of resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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